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In The

Supreme Court of the United States

October Term, 1991

POLARIS INDUSTRIES PARTNERS, L.P., a limited partnership, POLARIS INDUSTRIES L.P., a limited partnership, POLARIS INDUSTRIES ASSOCIATES L.P., a limited partnership, and POLARIS INDUSTRIES CAPITAL CORPORATION, a Delaware Corporation,

Petitioners,

vs.

WESTERN POWER SPORTS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The two questions presented by Polaris for review by the Court on writ of certiorari are inappropriate under the criteria outlined in Rule 10 of the Supreme Court Rules. The first issue merely presents an evidentiary question on what is incorrectly stated to be "uncontroverted" evidence. The second question appears to be an incidental attack upon established antitrust law regarding the necessary elements of a *per se* tying claim.

To the extent that any doubts may have previously existed, they have been laid to rest and both issues resolved as to this case by the very recent Supreme Court decision in *Eastman Kodak Co. v. Image Technical Services, Inc., et al.*, Case No. 90-1029, ____ U.S. ____, 60 L.W. 4465 (June 8, 1992).

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STATEMENT OF THE CASE

A. WPS and Polaris:

Ray Brandt began selling Polaris snowmobiles from the back

of his pickup truck in 1961. Polaris had designated him its distributor in the Northwest territory, which consisted of Montana, Washington, Oregon, Idaho, Utah and Wyoming. Mr. Brandt established the first network of Polaris dealers in the Western region. He sold snowmobiles as a sole proprietor dba Western Power Sports, until 1967 when he incorporated under the name Western Power Sports, Inc. Thereafter, WPS continuously sold Polaris snowmobiles through March 31, 1988, with the exception of the year 1973. During 1973, the only year between 1961 and 1988 that WPS did not sell Polaris snowmobiles it sold Rupp snowmobiles.

Mr. Brandt originally distributed Polaris snowmobiles on a handshake, oral agreement basis. It was not until 1973 that WPS and Polaris (the latter under new ownership and management) for the first time entered into a written distributor agreement for Polaris snowmobile products. That happened after Polaris realized during the 1973 sales year that it did not have the ability or the dealer network to sell snowmobiles in the WPS territory.

Through 1973, WPS sold Polaris products almost exclusively. After losing the Polaris distributorship for the year 1973, WPS began to sell aftermarket products for snowmobiles, and during the 1980s distributed additional products not manufactured by Polaris. Nevertheless, through the final fiscal year during which WPS sold Polaris products, Polaris snowmobiles accounted for about 50 percent of WPS's business and virtually all of its profits.

As of March 31, 1988, Polaris was the only snowmobile manufacturer which distributed its products through wholesale distributors such as WPS. With insignificant exceptions, the other manufacturers sold their products directly to dealers. Polaris distributors who lost their ability to sell Polaris snowmobile products had no other source of supply.

Polaris entered the ATV business in 1985. Polaris acknowledges in this lawsuit that it considered several modes of distribution. According to Kurt Degener, Polaris' former Director of Product Development, however, Polaris chose its then current snowmobile distributors to distribute its ATVs because it could force those distributors to purchase ATVs. While one distributor, Wyn Eaton, was told initially that he had no choice but to become an ATV distributor, others such as Joe Masek later came to the realization that they needed to purchase Polaris ATVs in order to continue purchasing Polaris snowmobiles. WPS was excited initially about the prospects for ATVs, and submitted a business plan seeking the right to sell Polaris ATVs in its geographical territory.

The enthusiasm of WPS and other distributors soon faded. During 1986, several factors combined to severely depress ATV sales in the United States. Those factors included saturation of the market, governmental restrictions because of environmental concerns in many areas of the country, and safety concerns regarding ATV use. By 1987, even Polaris was expressing concern about low ATV sales levels.

The quality of the initial ATVs manufactured by Polaris was beneath industry standards. Polaris' Product Development Manager, Mr. Degener, characterized the early ATVs shipped to distributors for resale as "prototypes" or "pre-production" models not yet ready to be sold at retail. The physical defects included an outdated two-stroke engine, substandard ATV frames, poor quality hardware, inadequate function of the rear brake, improperly applied paint and bottom-of-the-line plastic parts. Nevertheless, in the face of what Polaris perceived was a rapidly growing industry, Mr. Degener stated that Polaris made a management decision to rush these ATVs on the market in order to garner a quick market share by coercing its distributors to purchase those ATVs. Furthermore, those machines were priced

comparably to other manufacturers' much better products. Mr. Masek characterized Polaris ATVs as "turkeys" and "dogs".

Like the snowmobile distributor agreements, the ATV distributor agreements were adhesion contracts purporting to be for one year periods. Initially, the ATV agreements delineated a different fiscal year than the snowmobile agreement. It was not until 1987 that the fiscal year for the ATV agreements was changed to April 1 through March 31 to coincide with the snowmobile distributor agreements. *At all times, Polaris purported to treat the snowmobile and ATV agreements as entirely separate agreements,* and it is obvious that only in regions having winter snow could distributors or dealers sell both ATVs and snowmobiles.

After the public's enthusiasm for ATVs died and sales dropped, Polaris carried out its tie by forcing distributors to purchase unwanted ATVs under the subterfuge of evaluating snowmobile "distributor performance" by evaluations relating to both ATVs and snowmobiles. Distributors were alarmed at having their snowmobile performance evaluated in light of their sales of ATVs, because they were losing money on the sale of ATVs and related products. Distributors were informed of this evaluation process in January, 1986, by a Polaris letter to its distributors explaining that it declined to renew the snowmobile distributor agreement of a fellow distributor, Larsen-Olsen, because of its refusal to take a required allocation of ATVs. This early termination demonstrated to distributors that the purchase of snowmobiles and ATVs were tied together.

After the initial letter from Polaris regarding Larsen-Olsen, distributors including WPS understood that continuation of their ability to buy snowmobiles was contingent upon their continued purchase of allocated ATVs. The president of Polaris, Hall Wendel, indicated at the 1986 snowmobile distributor meeting

in Minneapolis, Minnesota, that sales of snowmobiles and ATVs were tied together, and he would "terminate his own mother if she reneged on an ATV order." Distributors, including WPS, therefore agreed to purchase from Polaris ATVs and related products that they did not want, with full knowledge that they would lose money on the sale of those ATVs.

Although Polaris' threat to terminate distributors who balked at ATV allocation succeeded in placing many ATVs on the retail market, it also resulted in the nonrenewal of several distributors. Polaris refused to sell snowmobiles to Larsen-Olsen because it balked at its ATV allocation. Similarly, Polaris refused to sell Eaton Manufacturing snowmobiles for "not selling enough ATVs." As late as March 28, 1988, Polaris indicated to WPS that Polaris would renew the snowmobile distributor agreement only if WPS took the allocated number of ATVs. When WPS refused to purchase the number of ATVs it had been allocated by Polaris, because of certain financial destruction, Polaris notified WPS of its decision not to renew the ATV or snowmobile agreements.

While most of Polaris' distributors sold products other than Polaris products, the ordering process was different with Polaris than with any other manufacturer. Polaris dictated to each individual distributor its allocation for any given year, and required that the written order prepared by Polaris be signed and returned without alternation. Distributors were only superficially included in the process which led to their own dictated allocation. Distributors did not believe the allocation process reasonably related to actual market conditions, but declined to fight the process in order to retain their snowmobile distributor rights.

Distributors, including WPS, were losing money on the sale of ATVs for the model years prior to the nonrenewal of WPS on March 31, 1988. The distributors lost money because they were

taking more ATVs from Polaris than could be profitably sold at retail, and taking more ATVs than the market could bear.

Polaris distributors never lost ultimate financial responsibility for ATVs even after they had been delivered to dealers. While Polaris could force distributors to take unwanted ATVs, the distributors had no such market power over their dealers. In order to market the ATVs at retail, the distributors participated in promotional programs and severe price reductions which not only wiped out any potential profit, but resulted in substantial losses. From a practical standpoint, to protect their dealers, distributors often had to repurchase ATVs which the dealer could not sell at retail.

On the other hand, as noted above, once distributors had paid cash for their ATVs, pursuant to allocations which had been determined by Polaris, Polaris no longer had financial responsibility for the ATVs. As a result, with a brand new product on which its distributors were losing substantial amounts of money, Polaris was able to make increasingly greater annual profit and profits on sales of its ATV.

In summary, Polaris refused to sell snowmobiles to distributors who did not accept dictated ATV allocations. Because of this, and after the downturn in the ATV market in 1986, Polaris distributors continued to agree to purchase ATVs in order to be able to purchase snowmobiles, even though they were losing money on the sale of those ATVs. This tying arrangement continued as to other distributors even after Polaris notified plaintiff it could no longer purchase snowmobiles after March 1, 1988 because of its refusal to purchase the allocated ATVs.[1]

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1. As with WPS, the forcing of ATVs typically lasted until a distributor could no longer tolerate ATV losses, at which time Polaris would terminate (Cont'd)

Finally, in light of Polaris' arguments regarding "reasonable substitutes" and "cross-elasticity," a brief discussion of the distributors' dealer networks is necessary.

WPS and the other Polaris distributors created and developed the snowmobile retail dealer networks in their respective territories at great cost and effort on their part, and with minimal assistance from Polaris. Typically, as in the case of WPS, the effort consisted of many years of seeking and developing relationships with financially sound dealers in a position to successfully conduct retail sales of Polaris snowmobiles at strategic locations within its distribution territory. The effort included education of dealers regarding the attributes and use of Polaris snowmobiles, the development of mutual confidence and the development of satisfactory and successful warehousing, financing, delivery and sales arrangements. It included the development of facilities and techniques for quick delivery of replacement parts and accessories, and it included the creation and active participation on the part of WPS in nonprofit associations of snowmobile users within the sales territories of its dealers.

(Cont'd)
the distributor, take over its dealer network and hire its top level snowmobile-ATV sales personnel. For example, in 1987 Polaris allocated to WPS 825 1988-model ATVs and Jim Brandt for WPS signed an order therefor after being told that he had no choice but to do so. When sales in 1987 showed that the number was clearly unreasonable, and when WPS complained, Polaris arbitrarily raised the allocation to 828 ATVs and terminated WPS when it refused to purchase the same.

The total number of 1988-model ATVs actually sold in WPS' territory was 486. This included 295 units sold by WPS prior to its termination on March 31, 1988 and 191 units sold by Polaris directly to dealers between March 31, 1988 and September 30, 1988, the end of the ATV sales year. The extra cost to WPS for the difference between 486 ATVs and the 828 ATVs allocated by Polaris was $720,088.53.

These factors are all relevant to Polaris' contentions regarding reasonable substitutes and cross-elasticity for several reasons, including the following:

> 1. WPS could not reasonably switch from the sale of snowmobiles and snowmobile parts, accessories and clothing to the sale of TV sets to, e.g., a snowmobile dealer located by a mountain in northern Washington. The market demands are obviously different and the efficiencies of its snowmobile distribution, promotion and sales techniques are clearly inapplicable to the retail sales of TV sets.
>
> 2. Regarding the cross-elasticity of supply, the snowmobile manufacturers other than Polaris had for many years prior to 1988 invested the time and money to develop their retail dealer networks and the relationships and techniques attendant thereto. Those manufacturers were not in a position to use wholesale distributors. Once Polaris stopped selling snowmobiles to a distributor for resale that distributor had no place to turn in order to obtain a new supply of snowmobiles. The distributor also had nothing to offer another manufacturer of snowmobiles in terms of its established dealer network because its dealers were still selling Polaris snowmobiles purchased directly from Polaris.

A finder of fact can conclude that "reasonable substitutes" and "cross-elasticity" were absent as to Polaris snowmobile distributors. The controlling law is discussed below.

B. The Polaris View of the Facts.

The petition for a writ of certiorari filed by Polaris in this matter includes a statement of the case set forth in pages 3 through

6 thereof. Statements of fact contained therein which are deemed misleading by WPS deal with its past wholesale business and the historical relationship between Polaris and WPS.

It is true that in the latter part of the 27-year history of WPS prior to 1988 the company, in an attempt to expand beyond a one-product distributorship in its wholesale business, did at one time or another sell, or attempt to sell, the products listed by Polaris. More relevant, however, is the fact that WPS was founded in 1961 as one of the earliest Polaris snowmobile distributors, and that throughout its entire history snowmobiles were the life blood of the company up to the time of its termination by Polaris in 1988.

At the time of termination WPS distributed products for only about five manufacturers in its original equipment business. As stated above, Polaris snowmobiles at that time accounted for about 50 percent of WPS's entire business, and for virtually all of WPS's profits. This was the result not only of the high quality of the Polaris snowmobiles created and developed by the original founders of Polaris, but also was result of the retail dealer network built almost single-handedly by WPS in the five-state territory in which it distributed Polaris snowmobiles and to which network Polaris succeeded after it terminated WPS.[2]

REASONS FOR DENYING THE WRIT

Any question regarding the viability of WPS's illegal tying claim against Polaris has been answered by this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, Case No. 90-1029, 60 L.W. 4465 (June 8, 1992). Therein, the Court

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2. Those dealers were not for the most part the same dealers WPS used in its sales of products other than snowmobiles and ATVs.

reaffirmed its *per se* rule against tying arrangements and held once again that where material issues of disputed fact are presented on the elements of a *per se* tying claim summary judgment is inappropriate.

The Court first distinguished the primary case relied upon by Polaris, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The standards governing review of summary judgment motions remain unchanged:

> [T]he evidence of [respondents] is to be believed, and all justifiable inferences are to be drawn in [their] favor.

Id. at 4466, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Court further reiterated that "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.* at 4470. The Court concluded in *Eastman Kodak* that in order to obtain summary judgment Eastman Kodak had the burden to "show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable." *Id.* Eastman Kodak failed in that burden.

WPS in this case produced evidence of excluded competition, adverse impacts on the competitive process, and market distortion. In order to obtain summary judgment, consistent with *Eastman Kodak*, Polaris was required to show that despite evidence of excluded competition and market distortion, an inference of market power was unreasonable. Polaris failed to carry that burden.

This Court in *Eastman Kodak* also reaffirmed the definition of "market power" adopted in *Jefferson Parish Hospital District*

No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984).

> Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'

Id. at 4468, quoting *Jefferson Parish*, 466 U.S. at 14. The evidence in this case is that WPS and all of Polaris' other distributors did things they would not do in a competitive market by purchasing ATVs they did not want and upon the sale of which they knew they would lose money, so that they could continue to purchase snowmobiles. The reasoning of the Court in *Eastman Kodak* reinforces WPS's theory on the market power issue.

This Court in *Eastman Kodak* examined the purpose of the antitrust laws as follows:

> The alleged conduct — higher service prices and market foreclosure — is facially anticompetitive and exactly the harm that antitrust laws aim to prevent.

Id. at 4472. WPS's evidence in this case establishes excluded competition, market distortion, and an anticompetitive effect in the market for ATVs — exactly the harm the antitrust laws aim to prevent.

Finally, this Court's decision in *Eastman Kodak* also answers the second "question presented" by Polaris' cert petition. Polaris tried to rewrite the *per se* illegal tying test established in *Jefferson Parish* by referring to the final element as "an actual adverse effect on competition or had a substantial potential for impact on competition." Polaris Petition, p. i. In *Eastman Kodak*, this Court phrased the final element as whether "the arrangement affects a substantial volume of commerce in a tied market." *Id.*

at 4468, citing *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969). *Eastman Kodak* thus reinforced that a simple arithmetical inquiry into the volume of commerce effected in the tied product market is all that is required in analyzing an unlawful tying claim. WPS satisfied that test.

This Court should deny review and let this matter proceed to trial. Its decision in *Eastman Kodak* has directly or indirectly addressed each and every argument raised by Polaris in its cert petition. The Ninth Circuit's decision reversing the grant of summary judgment is consistent with this Court's previous decisions in tying cases and consistent with this Court's most recent decision in *Eastman Kodak*.

I.

WPS'S EVIDENCE DEMONSTRATED POLARIS HAD AND EXERCISED MARKET POWER IN THE TYING PRODUCT OF SNOWMOBILES TO FORCE DISTRIBUTORS TO PURCHASE THE TIED PRODUCT ATVS.

Polaris challenges the Ninth Circuit's ruling that material issues of disputed fact preclude summary judgment as to whether Polaris had market power over its distributors in the tying product market of snowmobiles.[3] Summary judgment is improperly granted

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3. The long-standing Ninth Circuit rule is that the definition of a relevant market is a factual inquiry reserved for the trier of fact. *William Inglis & Sons Baking Co. v. I.T.T. Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied*, 469 U.S. 825, 103 S. Ct. 58, 74 L. Ed. 2d 61 (1982); *Los Angeles Memorial Coliseum Com'n v. N.F.L.*, 726 F.2d 1381 (9th Cir. 1984); *cert. denied*, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 995 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S. Ct. 876, 884, 93 L. Ed. 2d 830 (1987); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1446 (1988); *Image Technical*

(Cont'd)

where, as here, a plaintiff presents evidence which creates a disputed issue of fact as to whether the defendant had market power in the tying product market. In this case, three types of evidence establish material issues of disputed fact as to whether Polaris had market power in a relevant market over its distributors, including WPS.

First, the best evidence that Polaris had the market power to impose a tying arrangement is that Polaris in fact effectively imposed the tying arrangement. Distributors, including WPS, signed orders for the purchase of ATVs and subsequently purchased ATVs (both of which constitute violations of the Sherman Act/Clayton Act), which they did not want and did not believe they could sell, in order to purchase snowmobiles. In the historic case of *United States v. Addyston Pipe & Steel Co.*, then Judge Taft was faced with the claim that the defendants lacked market power. He responded:

> The most cogent evidence that they had this power is the fact everywhere apparent in this record that they exercised it.

85 F.271, 292 (6th Cir. 1897), *Affirmed,* 175 U.S. 211 (1898). The same is true in this case.

The reasoning of Judge Taft, that the best evidence of market power is the fact that it has been exercised, was reaffirmed by this Court in *Eastman Kodak* when the Court reasoned as follows:

> It is clearly reasonable to infer that Kodak has market power to raise prices and drive out

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(Cont'd)

Service, Inc. v. Eastman Kodak Co., 903 F.2d 612 (9th Cir. 1990); *Eastman Kodak Co. v. Image Technical Services, Inc.*, Case No. 90-1029, 60 L.W. 4465 (1992).

> competition in the after-markets, since respondents offer direct evidence that Kodak did so.

Id. at 4472. Substantial evidence in the record supports a jury finding that Polaris did in fact impose a burdensome tying arrangement on WPS and its other distributors. That evidence includes the following:

> 1. Polaris refused to renew the snowmobile distributor agreement of WPS's fellow distributor, Larsen-Olsen, because of its refusal to take a required allocation of ATVs.
>
> 2. A memorandum explaining the termination of Larsen-Olsen was distributed to the remaining Polaris distributors which specifically stated that the purchase of snowmobiles and ATVs would be henceforth tied together.
>
> 3. Thereafter, distributors, including WPS, understood that continuation of their ability to buy snowmobiles was contingent upon their continued purchase of Polaris ATVs.
>
> 4. The president of Polaris, Hall Wendel, indicated at the 1986 snowmobile distributor meeting in Minneapolis, Minnesota, that sales of snowmobiles and ATVs were tied together and that he would "terminate his own mother if she reneged on an ATV order."
>
> 5. According to Kurt Degener, Polaris' own director of product development:
>
> While I was at Polaris, and while deficiencies in ATV and construction were well known and understood by Polaris management, as well as the

> existence of a declining market in ATVs, an administrative decision was made and implemented to *coerce* Polaris distributors around the country to purchase unwanted ATVs. The decision was that distributors would be required to buy predetermined amounts of ATVs in order to get the more saleable product snowmobiles. Distributors were *forced* to contribute money to sales programs in order to get rid of the below standard ATVs on the retail market, on the Polaris philosophy that the distributors would have to share in losses, with the hope of making them up in the future if the new and improved ATVs would come out from Polaris. Particularly during the 1986/87 season, such sales programs devised by Polaris were *forced* upon reluctant distributors. It was well known by Polaris top management that the distributors, as well as dealers, were suffering significant losses in their distributors and sale of ATVs. (emphasis added)

Thereafter, and before Polaris determined not to renew WPS's snowmobile distributor agreement, the following further events occurred:

> 1. Eaton Manufacturing lost its snowmobile distributor agreement for "not selling enough ATVs."
>
> 2. Other Polaris distributors from around the country were also being terminated for their failure to cooperate on ATV sales.

In addition, Polari's distributors purchased ATVs they did not want and upon the sale of which they knew they would lose money, for years prior to and including the 1988 ATV model

year. They did so, so they could continue to purchase Polaris snowmobiles.

Forcing is the essence of what the Supreme Court contemplated when it referred to a seller using leverage to force a purchaser to do something it would not do in a competitive market. *Jefferson Parish*, 466 U.S. at 14 and n. 20; *Eastman Kodak*, 60 L.W. at 4468. Because Polaris was the only snowmobile manufacturer from which WPS, Masek, Eaton and other distributors could purchase snowmobiles, Polaris had substantial leverage or market power over its distributors. It used that market power to force WPS and its other distributors to purchase ATVs. Polaris' forcing enabled it to make a profit on an inferior prototype product for which it had not incurred normal development costs, to obtain 5 percent of the market in four years, and to make a profit during each one of those years, while its distributors and dealers were losing money that entire period of time.

WPS and other distributors were doing something they would not do in a competitive market, purchasing ATVs they could not sell. Polaris "coerced the abdication of buyers' [its distributors] independent judgment as to the tied product's merit [ATVs] and insulated [the tied product] from the competitive stresses of the open market." *Jefferson Parish*, 466 U.S. at 13, quoting *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 606, 73 S. Ct. 872, 97 L. Ed. 1277 (1973) (bracketed material added).

The reasoning for this rule was also articulated in *Jefferson Parish:*

> The seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the ***buyer either did not want at all or might have preferred to purchase elsewhere or on different terms where such "forcing" is***

> *present competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.*

Id., 466 U.S. at 13 (emphasis added). In this case the evidence is unrebutted that WPS and other distributors purchased ATVs that they did not want or would have preferred to purchase elsewhere.

The Sherman Act and Clayton Act require a competitive market in which goods survive or fail on their merits. Polaris knew its bad ATVs would not survive in a declining ATV market. Polaris tried to insulate its ATVs from competition by exploiting its market power over its ATV distributors. The exploitation of this power demonstrates its existence and violates the command of the antitrust laws that competitive forces should be allowed to operate. "Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition . . ." *Jefferson Parish*, 466 U.S. at 12, quoting *Times-Picayune*, 345 U.S. at 605. This was more than sufficient evidence of market power to preclude summary judgment on this issue.

The second category of evidence that Polaris had market power over its distributors is that Polaris had a large share of a properly defined relevant market. The market in this case is the wholesale market for snowmobiles in a five-state area. Polaris had market power because it was the only manufacturer of snowmobiles which sold to distributors such as WPS. Neither WPS nor any other distributor had the ability to obtain snowmobiles from another source. In assessing whether a seller has market power over a group of purchasers, the relevant market is defined by the alternative sources of supply to which those purchasers could turn. *Jefferson Parish, supra.* On that basis, Polaris had 100 percent of the relevant product market, the wholesale market for snowmobiles.

In its petition Polaris makes two basic errors in its claim that there are no material issues of fact in controversy regarding the power in the tying product element of the *per se* rule against tying. Initially, Polaris ignores evidence of its market power in both the wholesale and retail snowmobile markets, either of which is sufficient to defeat summary judgment. Additionally, when addressing the second category of evidence presented by WPS, Polaris ignores the entire record except for one two-question interchange in one deposition.

WPS presented expert and nonexpert evidence supporting the conclusion that the appropriate market for assessing Polaris' market power is the wholesale market for snowmobiles. Polaris has pointed to two short deposition answers as a basis for controverting this argument. Obviously, this creates a controverted issue of fact the existence of which should dispose of Polaris' petition. It is, however, worth exploring the questionable nature of Polaris' side of this factual dispute.

Polaris contends that the market is larger than snowmobiles available for purchase at wholesale. In making this contention Polaris refers to the concepts of the cross elasticities of demand and supply. These are of course appropriate concepts for determining a relevant market. Polaris, however, abuses both concepts by making assumptions about how easy it would be for WPS to enter new businesses and how willing other snowmobile manufacturers would be to abandon their relationships with retailers. Polaris contends that cross elasticity of demand is high because WPS could effortlessly switch from distributing snowmobiles to distributing other products. Polaris also argues that cross elasticity of supply is high because other manufacturers of snowmobiles would costlessly forsake their relationships with retailers and begin selling to wholesalers. Both of these assertions are false since they ignore the large costs of establishing or abandoning a complex set of multifaceted relationships with retail dealers.

The relationship between firms at different levels of a distribution chain is the result of years of effort to build up the trust necessary for effective cooperating in the marketing of a product. This trust is necessary since the firms must share information about the product and its consumers, must share financial risk and must allocate the numerous tasks in the most efficient manner. This Court has been very careful to prevent the disruption of this relationship by outside forces. *Business Electronics Corp. v. Sharp Electronics,* 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1985), 79 L. Ed. 2d 775; *Contintental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

In those areas of the country where Polaris distributed snowmobile products through its distributors, the snowmobile products were sold in the wholesale market. In that market, Polaris had no competition. Polaris did not sell directly to the public and did not sell directly to retailers. Instead, it used a distributor system whereby it sold its snowmobile products to independent distributors. Distributors who could not sell Polaris products would look to other manufacturers of snowmobiles as alternative sources for supply of those snowmobiles. There were none. The relationship at issue in this case, is the relationship between Polaris and its distributors, including WPS.

A third category of evidence WPS presented addressed the retail market for snowmobiles. Even if Polaris is correct that the relevant tying market was the retail sale of snowmobiles, Polaris' market share of 31 to 40 percent is sufficient market power in the snowmobile market.[4] Contrary to the assertion by Polaris that

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4. WPS agrees that Polaris' retail market share of the United States snowmobile market was *at least* 31 percent. Polaris' own expert witness testified that its market share might be as high as 40 percent.

the snowmobile market has ease of entry, there are now only four major manufacturers of snowmobiles, and only one manufacturer has entered or reentered the business during the 1980s. Furthermore, Polaris misunderstands this Court's decision in *Jefferson Parish* when it asserts that 30 percent of the market was insufficient to meet the market power requirement.

In *Jefferson Parish*, this Court did refer to the numbers 70 percent and 30 percent. However, these numbers were not used as shares of a relevant geographic market. Instead, the Court used those numbers to uphold the district court which found the relevant geographic market to be the entire New Orleans metropolitan area in which the defendant was only one of at least twenty hospitals. 466 U.S. 7, 26-27. 70 percent of the patients in the geographic area immediately surrounding the defendant hospital went not to the defendant hospital, but to hospitals elsewhere in the New Orleans metropolitan area. This demonstrated that hospitals elsewhere in the metropolitan area were good substitutes for the defendant hospital and should be included in the relevant market. Since there were at least 20 such hospitals, defendant's market share was insignificant. Polaris misreads *Jefferson Parish* as saying a producer with 30 percent of a relevant market does not have market power. This is clearly a mistake. The defendant hospital in *Jefferson Parish* was one of twenty metropolitan area hospitals and therefore had an insignificant share of the market.

This Court in *Jefferson Parish* never defined a relevant market. Rather, the Court simply said that of those patients who resided in East Jefferson Parish, 70 percent chose to use hospitals other than Jefferson Parish. The Court noted, "70 percent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson," 466 U.S. at 26, expressly indicating that those 70 percent who do not go to East Jefferson Parish are also in the relevant market. The Court never further defined that relevant market except by noting that there were at least 20 hospitals

therein. 466 U.S. at 27, n.44. In this case, Polaris is one of four snowmobile manufacturers, with at least 31 percent of the market.

The second important aspect of *Jefferson Parish* is that the Court found no evidence that any hospital patients had been forced to purchase hospital-provided anesthesiology services. The Court stated:

> Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.

466 U.S. at 27. In contrast, in this record WPS provided substantial evidence that it and other distributors were forced to purchase ATVs that they would not have purchased absent the tying arrangement. On that basis, *Jefferson Parish* supports WPS's position that Polaris has market power over WPS.

Relying upon cases wherein courts have rejected a single brand market, Polaris attacks the market definition supported by WPS. Polaris misguidedly relies upon *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318 (6th Cir. 1992) and other similar cases which have rejected market definitions limited to a single manufacturer. The court in *Virtual Maintenance* and the cases relied on therein simply rejected a plaintiff's suggested market definition consisting of a single manufacturer's brand. Unlike the plaintiff in *Virtual Maintenance* and the other cases relied on therein, WPS is not suggesting a market consisting of a single manufacturer's brand.

Here, consistent with *Jefferson Parish*, WPS is asserting a market definition based upon alternative sources of supply. That market consists of any manufacturer who sells snowmobiles to distributors. Polaris, of course, is the only product manufacturer selling products in that market. As Polaris was the only supplier

of snowmobiles to wholesalers, and wholesalers had no alternative sources to purchase snowmobiles, Polaris had 100 percent of the relevant market.

WPS presented substantial evidence that Polaris had market power in a relevant market sufficient to impose an unlawful and burdensome tying arrangement on its distributors. The Ninth Circuit's decision so holding is consistent with *Jefferson Parish* and *Eastman Kodak*.

II.

POLARIS' ILLEGAL *PER SE* TYING ARRANGEMENT AFFECTED A NOT INSUBSTANTIAL VOLUME OF COMMERCE IN THE TIED PRODUCT MARKET.

Polaris' position on its second issue is nothing more than a poorly disguised attack on this Court's illegal *per se* approach to tying arrangements when certain factors are present. Polaris is urging this Court to rewrite the third element of the *per se* illegal tying arrangement test reaffirmed in *Jefferson Parish* and *Eastman Kodak* so that its conduct is not *per se* illegal. WPS respectfully submits that an interlocutory review of a decision denying a motion for summary judgment is not an appropriate forum for a change in established law, at least not under the facts of this case.

Polaris contends that the third element of a prima facie *per se* tying violation is unsatisfied in this case. Polaris has never credibly asserted that the third element is anything other than a calculation of the volume of commerce in the tied product. Where, as here, the dollar volume is in the millions of dollars, there is no question that the "substantial volume of commerce" requirement is satisfied. Both the district court and Ninth Circuit had no trouble finding this element satisfied.

The third element of a *per se* illegal tying claim is well established as follows: "an effect on a noninsubstantial volume of commerce in the tied product." *Jefferson Parish,* 466 U.S. 2, 2-18; *Eastman Kodak,* 60 L.W. at 4468. Polaris tries to rewrite that third element as "an adverse effect on a not insubstantial volume of commerce in the tied product market." Petition for Certiorari, pp. 10, 21-24. While this Court's phrasing of the third element simply looks to the dollar volume of commerce affected by the illegal tie, Polaris' rewritten version confuses the *per se* rule with the rule of reason by focusing on whether or not there is an adverse effect in the tied product market.

As noted above, any doubt as to the proper phrasing of this element was answered by this Court in *Eastman Kodak*, wherein it stated:

> Such an arrangement violates Section 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement *affects a substantial volume of commerce in the tied market.*

Id. at 4468. The third element is satisfied if the dollar volume of commerce in the tied product is substantial, without regard to whether the illegal tie is otherwise shown to have an adverse effect in the tied product market.

The trial court properly found, and the Ninth Circuit concurred, that based upon *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969) ("*Fortner I*"), the amount of commerce affected in the tied product of ATVs was substantial. Fortner only requires that the amount of commerce be "substantial enough in terms of dollar volume so as not to be merely '*de minimis.*' "

In 1988 alone, the dollar volume affected is based on WPS's refusal to purchase 828 ATVs instead of the 500 to which WPS contends it ultimately agreed as a compromise of the Polaris allocation. The cost of those additional ATVs to WPS would have been over $700,000. In addition, for purposes of determining the substantiality of the sales affected in the tied product market, the Court should measure the total volume of sales tied by the alleged tying arrangement, not merely the portion of this total accounted for by the particular plaintiff who brings suit.[5] *Fortner I*, 394 U.S. at 502. Therefore, the Court can also consider the purchases of unwanted ATVs by Masek, Nelson & Small and Eaton in determining the total dollar volume of commerce affected in the tied product. The Court can also consider that those dollar volumes for each distributor were repeated on an annual basis. The *Fortner I* requirement that the tying arrangement affect a noninsubstantial volume of commerce and the tied product is met.

Finally, this Court should reject Polaris' legally incorrect assertion that the *per se* rule is inapplicable because their agreements are alleged to have had pro-competitive justifications. In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982), this Court rejected an identical argument as follows:

> The respondent's principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have pro-competitive justifications.

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5. Polaris has at all times sought to treat this case as one limited to a single distributor and a single product manufacturer, contrary to the record which is that Polaris imposed this illegal tying arrangement on all of its distributors for volumes of products in the millions of dollars. If Polaris terminated WPS as part of its attempt to impose an unlawful tying arrangement on all of its distributors, WPS may sue under the Sherman Act pursuant to this Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464 (1985), 79 L. Ed. 2d 775.

> The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if pro-competitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.

457 U.S. at 351, 73 L. Ed. 2d at 63. Like price fixing arrangements, tying arrangements with certain characteristics are *per se* illegal. No analysis of pro-competitive justifications is necessary where, as here, a *per se* illegal tying arrangement is established.

III.

WPS PRESENTED SUFFICIENT EVIDENCE OF ANTICOMPETITIVE EFFECT TO SURVIVE SUMMARY JUDGMENT ON ITS RULE OF REASON CLAIM.

In addition to establishing *per se* violations of the Sherman and Clayton Acts, WPS presented credible evidence that Polaris' tying arrangement would not survive rule of reason scrutiny.

Polaris has argued that foreclosure of other sellers of the tied product is the only anticompetitive effect giving rise to the prohibition against tying arrangements. The Court made clear in *Jefferson Parish* that anticompetitive effects in addition to foreclosure give rise to the *per se* rule against forced tying arrangements. The Court identified market distortion as an anticompetitive effect of tying arrangements as follows:

> [T]he seller's exploitation of its control over the tying product to force the buyer into the purchase

> of a tied product that the buyer did not want at all, or might have preferred to purchase elsewhere or on different terms. Where such "forcing" is present competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

466 U.S. at 13.

Polaris' former product development manager, Kurt Degener, testified that the same anticompetitive effect resulted from the tying arrangement imposed by Polaris:

> Deficiencies in ATV design and construction were well known and understood by Polaris management, as well as the existence of a declining market in ATVs. An administrative decision was made and implemented to *coerce* Polaris distributors around the country to purchase unwanted ATVs. The decision was that the distributors would be required to buy predetermined amounts of ATVs in order to get the more salable product, snowmobiles. Distributors were forced to contribute money to sales programs in order to get rid of the below-standard ATVs on the retail marked, under Polaris' philosophy that the distributors would have to share in losses with the hope of making them up; in the future if the new and improved ATVs would come out from Polaris. Particularly during the 86/87 season, such sales programs devised by Polaris were force upon reluctant distributors. It was well known by Polaris top management that the distributors, as well as dealers, were suffering significant losses in their

distribution and sale of ATVs. (emphasis added).

Mr. Degener's affidavit alone was sufficient to create material issues of disputed fact regarding the anticompetitive effect of this tying arrangement.

Mr. Degener's unrebutted testimony establishes that Polaris' illegal tying arrangement was an anathema of efficient and beneficial competition. Polaris made a corporate policy of forcing prototype substandard products on the wholesale, and thereby the retail, markets at prices comparable to those of its competitors by forcing those ATVs down the throats of its distributors, all of whom lost substantial sums on the sale of those ATVs while Polaris made a profit. After Polaris captured a 5 percent share of the ATV market by forcing its tie-in on its distributors, Polaris terminated those distributors. Without the tie-in, their substandard ATVs would not have survived the test of competitive marketing.

These substantial adverse impacts on the competitive process were anticipated by the *Jefferson Parish* Court which identified the evil of a tying arrangement as when "the seller coerces the abdication of buyer's independent judgment as to the tied product's merit and insulates (the tied product) from the competitive stresses of the open market." *Jefferson Parish*, 466 U.S. at 13, quoting [*Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 606]. Polaris ATVs did not "stand the cold test of competition" as further contemplated by *Jefferson Parish*, 466 U.S. at 12, quoting *Times-Picayune*, 345 U.S. at 605.

The affidavit of Mr. Degener also established an adverse impact on the retail market for ATVs, the tied product. The ATV market was affected in that to the extent Polaris sold ATVs, Polaris' competitors were foreclosed from that portion of the ATV market. Polaris' retail volume of ATV sales was in the millions of dollars. In addition, retail purchasers were affected as consumers

purchased substandard ATVs which they did not know were prototypes, based upon Polaris' reputation for making high quality snowmobiles. The substandard ATVs would not have made it to the retail market absent the forced tie-in in the wholesale market. In short, Polaris' illegal tying arrangement had anticompetitive intent and anticompetitive consequences in the ATV market.

Polaris has asked the Court to weigh the procompetitive benefits of its decision to go dealer direct in analyzing its unlawful tying arrangement. Weighing procompetitive benefits with anticompetitive effects is an appropriate inquiry in rule of reason analysis. However, WPS has never challenged the decision to go dealer direct and has not asserted that is was unlawful. Rather, WPS has challenged Polaris' illegal tie and it is the alleged procompetitive effects of that illegal tie which must be weighed with any procompetitive benefits flowing from that tie. *Jefferson Parish*, 466 U.S. at 30. WPS presented substantial evidence of anticompetitive effects, which evidence was sufficient to create disputed issues of material fact precluding summary judgment on its rule of reason claim.

CONCLUSION

Based upon all of the foregoing authorities, and particularly under the controlling cases of *Jefferson Parish* and *Eastman Kodak*, the Polaris petition for writ of certiorari should be denied.

Respectfully submitted,

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